JOHN LOSKOT

IBLA 81-1020 Decided March 10, 1983

Appeal from decision of the California Desert District Office, Bureau of Land Management, rejecting a plan for mine operations in a wilderness study area. CA MC 87665.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness -- Mining Claims: Generally

The Bureau of Land Management is directed by sec. 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976), to manage lands under review for wilderness suitability so as to prevent impairment of wilderness characteristics, except that the continuation of existing mining uses in the same manner and degree in which they were being conducted on the date of enactment of FLPMA (Oct. 21, 1976) is allowed. Such grandfathered use is properly regulated to prevent unnecessary or undue degradation of the land and its resources.

APPEARANCES: John Loskot, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal is brought by John Loskot from a decision of the Manager, California Desert District, Bureau of Land Management (BLM), Riverside, California, disapproving appellant's plan of operations for construction of access roads to his mining claims located within a wilderness study area (WSA). The plan of operations was required to be filed pursuant to Departmental regulations at 43 CFR Subpart 3802, 1/ issued pursuant to section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976).

1/ Departmental regulations in 43 CFR Subpart 3802, Exploration and Mining, Wilderness Review Program, were published in the Federal Register (45 FR 13968) on Mar. 3, 1980, and were effective Apr. 2, 1980.

Appellant is the owner of mining claims originally located in March 1981 and recorded with BLM in May 1981. The claims are situated in the California Desert Conservation Area on land identified as areas 219, 220, and 221 in the Saddle Peak Mountains WSA. Appellant's plan of operations called for the bladed construction of four spur roads in area 219 of the WSA to be connected with existing roads in order to provide access to appellant's mining claims. Although area 219 of the Saddle Peak Mountains WSA is not being recommended for wilderness designation, BLM found that appellant's proposed roadbuilding would impair the wilderness character of land within the WSA in violation of the interim management policy.

On appeal, appellant asserts that the BLM decision violates his constitutional right to use his property and his rights under the Mining Laws of 1872. Appellant also notes that area 219 is no longer under consideration for wilderness designation. Appellant requests a hearing on appeal.

The BLM letter decision denying appellant's request for approval stated in part:

> The Federal Land Policy and Management Act requires the Secretary of the Interior to regulate mining operations in lands under wilderness review to prevent impairment of the suitability of these areas for inclusion in the wilderness system.
> * * *
>
> The activity as proposed would impact the naturalness of this study area. This impairment would result from impacts, both individual and cumulative, that are not capable of being reclaimed to a condition of being "substantially unnoticeable" in the study area as a whole by the time the Secretary of the Interior is scheduled to send his recommendations on that area to the President.

The Secretary of the Interior is directed by section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1976), to review those roadless areas of 5,000 acres or more identified during the inventory of the public lands as having wilderness characteristics 2/ and make a recommendation to the President regarding the

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2/ Sections 103(i) and 603 of FLPMA, 43 U.S.C. §§ 1702(i) and 1782 (1976), incorporate by reference the definition of wilderness characteristics embodied in section 2(c) of the Wilderness Act of 1964, 16 U.S.C. § 1131(c) (1976), set forth as follows:

"A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of underveloped [sic] Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value."

suitability or nonsuitability of each such area for preservation as wilderness. Specific guidance with respect to management of those identified lands pending completion of the review and action by Congress in response to the recommendations is provided by section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1976), which states in pertinent part:

> During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976: Provided, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

This interim management mandate for wilderness review lands is further tempered by the provision of section 701(h) of FLPMA that all actions of the Secretary under the Act shall be subject to "valid existing rights." 43 U.S.C. § 1701 note (1976).

Regulations implementing this management authority require an approved plan of operations for mining activities on lands under wilderness review prior to conducting operations which might impair wilderness values, such as construction of access roads, cutting of trees over 2 inches in diameter, or use of mechanized earthmoving equipment such as bulldozers. 43 CFR 3802.1-1. An approved plan of operations is not required for operations continued in the same manner and degree as operations existing on October 21, 1976, unless they are causing undue or unnecessary degradation of the land and its resources. 43 CFR 3802.1-3.

[1] Section 603 of FLPMA provides a bifurcated standard for management of tracts of land of 5,000 acres or more identified as having wilderness characteristics. BLM is authorized to manage the lands so as to prevent impairment of wilderness characteristics unless the lands are subject to an existing mining, grazing, or mineral leasing use. Section 603(c) authorizes continuation of such existing uses in the "same manner and degree" as they were being conducted on October 21, 1976. In the case of such an existing use conducted in the same manner and degree, BLM is authorized to regulate only so as to prevent unnecessary or undue degradation of the environment. State of Utah v. Andrus, 486 F. Supp. 995, 1005 (D. Utah 1979); Dale F. Gimblett, 60 IBLA 341 (1981); 43 CFR 3802.1-3. The existence of some operation which is actually being conducted on the land on October 21, 1976, is a prerequisite to authorization of subsequent activities in the same manner and degree. Dale F. Gimblett, supra.

Since the record indicates these claims were not located until after enactment of FLPMA, there is no doubt that development of the claims through roadbuilding would exceed the manner and degree of any existing mining use on October 21, 1976. Accordingly, activity in connection with the claims within the WSA is properly subjected to the more rigorous nonimpairment standard until Congress has acted on the recommendations made pursuant to section 603 of FLPMA. Although appellant contends this restriction should not apply in

light of the recommendation not to designate the WSA as a wilderness, section 603(c) of FLPMA expressly provides that land within a WSA shall be managed under the nonimpairment standard "during the period of review of such areas and until Congress has determined otherwise." 43 U.S.C. § 1782(c) (1976).

With respect to appellant's contention that the BLM decision abridges his rights under the Federal Mining Law of 1872, it should be noted that the wilderness study process is subject to valid existing rights. FLPMA, section 701(h), 43 U.S.C. § 1701 note (1976). However, the fact that appellant's claims were not located until after enactment of FLPMA precludes a finding of rights based therein which would preempt the nonimpairment standard. Enactment of FLPMA amended the Mining Law of 1872 to the extent of precluding conduct of mining related activities on lands within a WSA which would impair the wilderness characteristics of the area except for valid existing rights and the continuation of pre-FLPMA mining activities in the same manner and degree as conducted prior to October 21, 1976. See FLPMA, section 302(b), 43 U.S.C. § 1732 (1976).

The record supports the BLM finding that the proposed road construction under the plan of operations would impair the wilderness characteristics of land within the WSA and appellant has not challenged this finding of fact on appeal. A request for an evidentiary hearing is properly denied in the exercise of the Board's discretion under 43 CFR 4.415 where there are no disputed issues of material fact and the decision on appeal depends upon the legal consequence of facts of record. See John J. Schnabel, 50 IBLA 201 (1980).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the California State Office is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge